In the Supreme Court of the United States

OCTOBER TERM 1954

No. 108

AARON BORIN, D/B/A WICHITA PACKING COMPANY,

Petitioner,

v.

UNITED STATES OF AMERICA.

Brief of Western States Meat Packers Association, Inc., as Amicus Curiae in Support of Petition for Writ of Certiorari.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

Pursuant to Rule 42, consent to this brief has been obtained from the Solicitor General and from petitioner.[1]

THE INTEREST OF AMICUS CURIAE

Western States Meat Packers Association, Inc. is an association of 441 independent meat packers, chiefly in the nine western states. Its interest in the questions involved is the interest of its members, and their deep concern illustrates the importance of the questions

[1]Copies of the consents are attached as Appendix II.

and the need for resolution by this Court. Petitioner is not a member of the Association, but the suit against him forebodes similar suits against other packers. One complaint for several million dollars has already been filed against a member, *United States of America v. Union Packing Company,* No. 16729 (S.D. Cal.).

This suit seeks to recover from petitioner the amount of beef-slaughter "subsidies" paid him during World War II. To be eligible for payments a packer had to conform to the various OPA regulations and had to certify that he had done so. The basis of the suit is that the packer violated OPA regulations and therefore improperly applied for and received the payments.

These subsidies were not gratuities but an adjustment of inequities produced under the Emergency Price Control Act of 1942 by the imposition of low ceilings on meat products sold by the packer while the cattle raiser was allowed to charge the packer high prices for livestock in order to encourage livestock production.[2]

In this subsidy program about 26,000 subsidy claimants received payments.

Authorized Destruction of War-Time Records

Defense against a charge of violation would require reference to the voluminous records of the war years. Wartime price controls ended June 30, 1947. The Emergency Price Control Act of 1942 and the regulations issued thereunder required the packers to keep records, *Riverview Packing Co. v. Reconstruction Finance Corporation,* 207 F.2d 361, 365 (3 Cir.). On October 23, 1946, the Price Administrator issued Supplemental Order No. 189 requiring these records to be preserved (11 F.R. 12568). This order has been amended seven times.[3] Amendment No. 3 is-

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[2] *Armour & Co. v. Reconstruction Finance Corporation,* 162 F.2d 918, 922 (Em. Ct. App.); *Riverview Packing Co. v. Reconstruction Finance Corporation,* 207 F.2d 361, 367 (3 Cir.).

[3] 11 F.R. 13442, 12 F.R. 7327, 13 F.R. 1262, 14 F.R. 3707, 17 F.R. 18, 18 F.R. 33, 18 F.R. 8698.

sued February 20, 1948 required preservation of records by "all persons who have received any subsidy payment" (13 F.R. 1262). But amendment No. 5 of December 27, 1951 (17 F.R. 18) *authorized the destruction of the records.*[4] This was signed by the Secretary of Agriculture, the Chairman of the R.F.C., and the Acting Director of the Division of Liquidation of the Department of Commerce, and was approved by the Attorney General. To institute suits after authorizing the destruction of the old records almost savors of an entrapment and is incompatible with the rules of repose.

As said in *Guaranty Trust Co. v. United States,* 304 U.S. 126, where this Court was dealing with a claim of sovereign immunity from the Statute of Limitations,

> "The statute of limitations is a statute of repose, designed to protect the citizens from stale and vexatious claims, and to make an end to the possibility of litigation after the lapse of a reasonable time. It has long been regarded by this Court * * * as a meritorious defense, in itself serving a public interest." (p. 136)

The problem is not restricted to beef slaughtering subsidies. Other subsidies were paid to equalize the burden of price control; e.g., subsidies to coffee importers who had to pay uncontrolled prices abroad but whose sales prices in this country were regulated. Suits to recover coffee subsidies have been brought, and the application of the statute of limitations has been raised, *Reconstruction Finance Corporation v. McCarthy Bros.,* 117 F. Supp. 345 (D.C. Cal.). Other such suits are threatened.

The court below holds that no statute of limitations can be interposed to these suits. If so, anyone who accepted a subsidy during the war—nay, had to accept a subsidy in order to continue in business—took upon himself the burden of future harassment for time without end.

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[4]It required preservation only by parties to litigation then pending under the Act, by those who then had subsidy payments still withheld, by those on whom demand for repayment had been made, and by those to whom a notice to preserve the records should be mailed prior to March 1, 1952.

QUESTIONS PRESENTED AND REASONS FOR THIS BRIEF

1. The petitioner Borin has presented one question, viz.:

> "May the defense of a state statute of limitations be asserted in an action brought in the name of the United States of America for the recovery of subsidy payments made by the Reconstruction Finance Corporation in administering that program?"

We believe that something may be usefully added to petitioner's discussion; for example, the existence of a conflict with the Seventh Circuit and possibly with the Ninth.

2. There is another question which we feel should be presented, and which we therefore call to the Court's attention pursuant to Rule 42(3), viz.:

> Where an action could be maintained by the United States under the False Claims Act except for the bar of the statute of limitations therein contained, may that bar be eluded by casting the claim for relief in the form of a common law action for restitution of moneys improperly obtained or of a common law action for fraud?

STATUTES INVOLVED

The False Claims Act (R.S. 3490-3494, as amended, 57 Stat. 608, 31 U.S.C. Sec. 231-235) is involved in addition to the statutes quoted in the petition and brief in opposition. Section 7 (31 U.S.C., Sec. 235) provides:

> "Every such suit shall be commenced within six years from the commission of the act, and not afterward."

Other portions of this Act are quoted in Appendix I.

DISCUSSION

We present the second question first, for if we are correct as to it, the other question need not be reached.

I.

The Action Is Barred by the Statute of Limitations Contained in the False Claims Act.

The False Claims Act gives the Government a right to recover all moneys obtained from it by any species of fraud, falsehood, deceit or fiction. Prior to its enactment the Government doubtless could have utilized, in some circumstances, either a common-law action for fraud or some other form of common-law action for restitution. The False Claims Act is more comprehensive than these. Any claim theretofore maintainable can be maintained under the Act, and in addition it subjects the offender to double damages and other sanctions. While it gives informers the right to institute actions, it is not confined to *qui tam* suits.

And it imposes a 6-year statute of limitations.

It has been argued in the past that the purpose of the Act was penal. But this Court has reviewed the statute and held that its purpose was not to create a penal liability but to provide the United States with a more effective means of recovering money improperly taken from it. *United States ex rel. Marcus v. Hess,* 317 U.S. 537, 551.

No reason can be imagined why the Government should ever wish to proceed under the common law rather than under this statute except to escape the 6-year bar. The simple question therefore is this:

When Congress has enacted a comprehensive statute regulating a given field, when it has "occupied that field" and has seen fit to include a statute of limitations, may the statute be ignored as merely cumulative and resort be had to prior remedies in order to escape that bar?

The court below holds that it may, relying on *Pooler v. United States,* 127 Fed. 519 (1 Cir. 1904) and a dictum in *United States v. Silliman,* 167 F.2d 607, 611 (3 Cir.).[5] But the reasoning of the

[5]In the *Silliman* case a judgment in favor of the United States was reversed on other grounds, so that the issue was not available for presentation to this Court.

Pooler case has long since been shown to be unsound. Its reasoning was that the "remedy given [by the False Claims Act] is strictly penal, and not only so, but *qui tam.*" The first branch of this reasoning was rejected by this Court in *United States ex rel. Marcus v. Hess,* supra. The second is not only untrue under the present text of the statute, but the Court below has recognized it to be untrue by holding in this case that the 6-year bar applies to a suit under the Act instituted by the Government itself.[6]

The *Silliman* dictum is based on the view that a statute giving a cumulative remedy does not abrogate a prior common law remedy. But where a statute providing a comprehensive remedy fully covers the subject matter with which it deals, it carries with it an implication that pre-existing remedies are precluded or totally incorporated in the new system. *Bindczyck v. Finucane,* 342 U.S. 76; *United States v. Klein,* 153 F.2d 55 (8 Cir.); *Jackson v. Cravens,* 238 Fed. 117 (5 Cir.); *Hassel et al. v. United States,* 34 Fed. 2d 34 (3 Cir.). The principle is summed up in *Jackson v. Cravens,* supra:

> "We think the contention of appellants also conflicts with the rule of construction that where a statute provides a new, specific and complete remedy, and fully covers the subject-matter, the provisions of the statute will be looked to alone and resort will not be had to prior existing general remedies as cumulative." (p. 120)

In truth the real question is not whether the former common law remedies are still available; they merely gave the government single damages, and if it chooses to pray for single damages under the False Claims statute, it is free to do so. The real question is one of Congressional intention: Did it mean to prescribe a time limitation for such suits? The legislative history of the False Claims Act shows that Congress had before it the two opposed social considerations that must always arise in deciding whether claims of the government should be subject to limitations:—on the one hand,

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[6]The Government contended that the 6-year bar applied only to suits brought by informers.

that when moneys have been improperly obtained from the government, there should be no limitation of time upon recovery; on the other, that evidence vanishes with time and even the government should be held to some diligence. These conflicting social policies were presented to Congress and were reconciled by enactment of a 6-year bar.

The following occurred in the Senate (Congressional Globe, 37th Congress, 3rd Session, p. 958):

> "Mr. Howe: I will inquire of the Senator from Michigan if he would have any objection to striking out 'three,' and inserting 'six,' in the eighth section; so that it will read:
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> That every such suit shall be commenced within six years from the doing or committing the act, and not afterwards.
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> Mr. Howard: Not the slightest.
>
> Mr. Grimes: You ought to make it a longer period.
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> Mr. Howe: I will move to amend that section by striking out 'three' and inserting 'six.'
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> Mr. Grimes: I suggest to the Senator from Wisconsin to enlarge the term of the limitation to ten years. If a man swindles the Government in times like these, *there ought never to be any limitation;* and no matter when the development may be made, no matter when it shall be discovered that he has been guilty of perpetrating fraud on the Government, the Government ought to have the privilege of coming to him, or his estate and his heirs, and recovering money of which he has defrauded it. I trust the Senator will accept my proposition, to make it ten years in place of six.
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> Mr. Howe: I have no personal objection to the limitation proposed by the Senator from Iowa; but when I rose to propose the amendment I saw that there was a difference of opinion, some suggesting one term and some another; and I thought perhaps six years would meet with the views of the Senate, and perhaps ten would not. *There is some weight, I think, to be given to this consideration, that the Government ought to be held to some little diligence in prosecuting these men. Besides, we cannot shut our eyes to the fact that in the lapse of ten years or a longer period testimony is likely to be lost; the memory is likely to be obscured as to the facts of a transaction; and an investigation prosecuted at that distance of time would be attended with trouble and hazard.* I should

not oppose a proposition to insert ten years; but I think, pe haps, six years will be enough.

The Presiding Officer: The question is on amending th eighth section by striking out 'three' and inserting 'six'.

The amendment was agreed to.

The bill was ordered to be engrossed for a third readin was read the third time, and passed." (Italics added.)

When Congress chose to impose a 6 year statute of limitatio on false claim suits, we think it inconceivable that it intended t permit the government to be free of any limitations by confinin its prayer to single damages. To so conclude is to ignore the ra tionale of this subject as stated in *Guaranty Trust Co. of New Yor v. United States,* 304 U.S. 126: While the rule *quod nullu tempus occurrit regi* is a vestigial remnant of a prerogative o the Crown, its only justification for survival must be found i considerations of public policy to preserve public rights against th neglect of public agents. But that social policy conflicts with th strong social policy favoring repose. Consequently, as this Cou said in the *Guaranty* case, supra:

> "those rules which must be assumed to be founded on prin ciples of justice applicable to individuals, are to be relaxe only in response to some persuasive demand of public polic generated by the nature of the suitor or of the claim which i asserts. That this is the guiding principle sufficiently appear in the many instances in which courts have narrowly re stricted the application of the rule *nullum tempus* in the cas of the domestic sovereign." (p. 135)

Where Congress has not reconciled these conflicting social pol icies, this Court must do so as best it can. But where Congress has considered and reconciled them, its resolution should be given the fullest effect; and a Congressional decision in favor of ele mentary notions of justice should not be whittled away by clever pleading.

THE BAR OF THE STATUTE MAY NOT BE EVADED BY RESORT TO THE COMMON LAW FICTION OF WAIVING THE TORT AND SUING IN ASSUMPSIT.

The court below not only held that the government could maintain this action as a common-law fraud action but that it could maintain it as a suit for restitution of subsidies under authority of the Emergency Price Control Act of 1942 and implementing directives. But that Act made no provision for recovery of payments made on invalid claims.[7] And the directive (Sec. 7003.9, Defense Supplies Corporation Reg. No. 3) merely negatived the idea that payment of a claim would constitute an account stated. While a cause of action for recovery of payments made on invalid claims may exist, the theory, apart from fraud, must be that of a contract implied in law. In traditional legal language, this "waives the tort, and sues in assumpsit".

The fiction of "waiving the tort and suing in assumpsit" arose historically for certain procedural reasons. It cannot enlarge a right and avoid a bar imposed by Congressional enactment. In *Loughman v. Town of Pelham,* 126 F.2d 714 (2 Cir.) the court endorsed and applied the conclusion on this subject of Professor Corbin in "Waiver of Tort—Suit in Assumpsit", 19 Yale Law Journal 221, that the statute of limitations applicable to the tort should not be thus avoided. As Professor Corbin states:

> "* * * The fiction should not be used to enlarge a right. The fact that it has been used to dodge the rule that a personal action dies with the person, or to expand the right of set-off which the common law technically and inconveniently limited is no ground for using it to nullify a legislative act based on sound public policy * * * in the cases here con-

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[7]The cases cited in the opinion below as pertinent were not suits by the United States to recapture subsidy payments but were suits against the Reconstruction Finance Corporation to collect subsidies. *United Meat Co. v. Reconstruction Finance Corporation,* 174 F.2d 528 (D.C. Cir.); *San Antonio Packing Co. v. Reconstruction Finance Corporation,* 182 F.2d 614 (Em. Ct. App.); *Taylor & Richards v. Reconstruction Finance Corporation,* 193 F.2d 877 (Em. Ct. App.).

sidered there is a recognized tort, it is the real cause of action, and the tort limitation should control." (p. 236).[8]

II.

If Not Barred by the Statute of Limitations in the False Claims Act, the Suit Should Be Subject to the Applicable State Statute.

This suit has been filed *sub nom.* the United States as plaintiff, although the moneys were paid out by corporations, the Defense Supplies Corporation and the Reconstruction Finance Corporation,[9] and although similar suits have been filed in the name of the R.F.C. Doubtless the purpose of suing in the name of the United States was to try to take advantage of privileges and immunities thought to be available to the sovereign.

The petition does not present the question whether the United States is a proper plaintiff.[10] But assuming that it is, freedom from

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[8]For a similar conclusion, see *Hart v. E. P. Dutton & Co.,* 93 N.Y.S. 2d 871; *O'Connell v. Chicago Park Dist.,* 376 Ill. 550, 34 N.E. 2d 836; *Schmidt v. Merchants Despatch Transportation Co.,* 270 N.Y. 287, 200 N.E. 824.

[9]As said in *Riverview Packing Company v. Reconstruction Finance Corporation,* 207 F.2d 361 (3 Cir.):

> "here Congress by section 2(e) of the Emergency Price Control Act expressly provided that the subsidy payments should be paid only by corporations created or organized pursuant to section 5d of the Reconstruction Finance Corporation Act, 15 U.S.C.A. § 609j, as determined by the Federal Loan Administrator. Pursuant to that authority the Federal Loan Administrator designated Defense Supplies Corporation to carry out the meat subsidy program. That corporation had been incorporated under section 5d of the Reconstruction Finance Corporation Act in 1940. * * * By the Act of June 30, 1945, 59 Stat. 310, 15 U.S.C.A. § 611 note, Defense Supplies Corporation was dissolved and its functions, powers and duties were transferred to the defendant * * *
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> "* * * By section 2(e) Congress directed that subsidies should not be paid by Government officers, to whom immunity would apply, but exclusively by certain Government corporations * * *." (pp. 366, 367)

[10]The citations, in the government's brief in opposition, of decisions of this Court as support for the statement that the suit can be brought in the name of the United States are disingenuous. *Cherry Cotton Mills, Inc. v. United States,* 327 U.S. 536 involved the right of the United States to set

the statute of limitations is no different than if suit were brought in the name of the R.F.C.; if the latter would be barred, the United States is barred. *Guaranty Trust Co. v. United States,* 304 U.S. 126, 141, 142. As the Court took pains to state in *Cherry Cotton Mills v. United States,* 327 U.S. 536, a holding that a claim of a corporate agency can be presented in the name of the United States does not mean that it possesses sovereign immunities.

This Court has never decided whether a corporation like the R.F.C. is subject to state statutes of limitations, and this is certainly "an important question of federal law which has not been, but should be, settled by this Court." Rule 19b.

The lower federal courts are in direct conflict with each other.

Of the Courts of Appeals, only the Fifth Circuit (in this case) has held that the R.F.C. is not subject to the statute. The Seventh Circuit, in *Dorsey v. Reconstruction Finance Corporation,* 197 F.2d 468, has held that it is.[11] The Ninth Circuit in *Lawrence Warehouse Co. v. Defense Supplies Corporation,* 168 F.2d 199 has evinced belief to the same effect.[12]

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up as a counterclaim moneys due the R.F.C. when sued directly. *New Brunswick v. United States,* 276 U.S. 547, *Erickson v. United States,* 264 U.S. 246, and *Clallam County v. United States,* 263 U.S. 341 were suits where the corporation was a party plaintiff, the United States being joined as a party. The statute involved in *United States v. Lindsay,* 346 U.S. 568 permitted the United States to sue and specified that by doing so it should have no exemptions or immunities not possessed by the Commodity Credit Corporation. 15 U.S.C. Sec. 714b.

United States v. Allied Corp., 341 U.S. 1, *United States v. Remund,* 330 U.S. 539, and *United States v. Summerlin,* 310 U.S. 414 did not involve corporations but claims of the United States possessed by regular agencies in the executive branch. See discussion infra this brief.

[11]In the *Dorsey* case, the District Court, after holding the R.F.C. subject to the statute, decided in its favor on the ground that the statute had been avoided under the state law by an account stated (101 F. Supp. 197). The Seventh Circuit affirmed on the basis that the Illinois statute did not preclude application of collateral but held, "It is true that the statute of limitations had run on this note before this action was commenced."

[12]In that case the court vacated a judgment in favor of Defense Supplies Corporation entered after its statutory demise on the ground that the action abated because the R.F.C. was not substituted as plaintiff within the proper

In the District Courts, *Dorsey v. Reconstruction Finance Corporation,* 101 F. Supp. 197 (N.D. Ill.) and *Reconstruction Finance Corporation v. Foster-Wheeler Corporation,* 70 F. Supp. 420 (D.C. Tex.) hold that the R.F.C. is subject to state statutes of limitations, on the reasoning of *Reconstruction Finance Corporation v. Menihan Corp.,* 312 U.S. 81.[13] *Reconstruction Finance Corporation v. McCarthy,* 117 F. Supp. 345 (N.D. Cal.) (rejecting the *Foster-Wheeler* case), *Reconstruction Finance Corporation v. Marcum,* 100 F. Supp. 953 (W.D. Mo.) and *United States v. New York Dock Co.,* 100 F. Supp. 303 (S.D. N.Y.) hold to the contrary.

The court below rested on *United States v. Summerlin,* 310 U.S. 414, and the brief of the Solicitor General in opposition contends that the *Summerlin* case is a direct holding in point. But that case did not involve a suit by or through a government corporation. It was a suit by the government on a claim possessed by it through the Federal Housing Administrator, an officer in the Executive Branch of the government. That a government corporation is an agency of the government does not alter the fact that it is still a private corporation, "an entity distinct from the United States and from any of its departments or boards." *Skinner and Eddy Corporation v. McCarl,* 275 U.S. 1, 5, 11. Thus in *United States v. Remund,* 330 U.S. 539, the Court emphasized that the agency there involved, the Farm Credit Administration,

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time, and that claims of Defense Supplies Corporation had been transferred by statute to the R.F.C. Said the Court:

> "* * * after the twelve months it could have begun a new suit against appellants. That it now may have lost that right to sue by some statute of limitation is no more relevant here than it would have been to the holding in the Fix case." (p. 205)

This Court reversed, *Defense Supplies Corporation v. Lawrence Warehouse Company,* 336 U.S. 631 on the ground that the action did not abate and did not touch on the limitations question.

[13]In accord: *Home Owners Loan Corporation v. Williams,* 168 S.W. 2d 325 (Tex. Civ. App.).

> "bears none of the features of a government corporation with a legal entity separate from that of the United States." (p. 541)

and that

> "At no time has [it] been other than an unincorporated agency of the United States Government * * *. In short, it is an integral part of the governmental mechanism." (p. 542).

Moreover, it is a demonstrable fact that Congress did not believe that the *Summerlin* case decided that government corporations are immune from state statutes of limitations. The *Summerlin* case was decided in 1940. When The Commodity Credit Corporation Charter Act was enacted in 1948 (62 Stat. 1070), the Senate Bill provided that the corporation should have various immunities of the United States, including immunity from state statutes of limitations. The Senate Report (S.R. No. 1022, March 24, 1948) explained:[14]

> "Subsection (e) provides that the Corporation shall have the rights, privileges, and immunities of the United States and may assert them in any suit, action, or proceeding. * * * The section enumerates, but not by way of limitation, certain of the rights, priorities, and immunities of the United States which would, by virtue of this section, be enjoyed by the Corporation. The enumerated limitations are, generally speaking, those which, by decision of the Supreme Court, are not presently enjoyed by the corporation, for example immunity from imposition of court costs, fees, and charges, and exemption from allowance of interest on claims and judgments; *and those as to which the question of applicability has not been determined by the Supreme Court, such as the applicability of State and local statutes of limitations to Government corporations.*" (Italics added)

The House amendment contained no such provision for immunity from statutes of limitations. In Conference a 4-year

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[14]2 U.S. Code Congressional Service, 80th Congress, 2d Sess. 1948, pp. 2138, 2149.

statute was provided as a compromise between complete immunity and subjection to state statutes.[15]

This history of The Commodity Credit Corporation Charter Act may be contrasted with certain history of the Reconstruction Finance Corporation Act. Only 35 days before the enactment of The Commodity Credit Corporation Charter Act in 1948 Section 3 of the R.F.C. Act was amended to extend to the R.F.C. some but not all of the immunities and privileges of the United States, viz., exemption from court costs and priority for certain debts (62 Stat. 262, 15 U.S.C. 603). No exemption from the statute of limitations was stated. Yet at that time the only reported case on the subject was *United States v. Foster-Wheeler Corporation,* 70 F. Supp. 420, decided only the year before, which held that the R.F.C. was subject to the state statutes of limitations.

In at least one other act creating a government corporation Congress has shown its belief that statutes of limitations do apply. The Act of June 3, 1924, 43 Stat. 360, creating the Inland Water Ways Corporation, provided (Sec. 6(f)):

> "In determination of the running of the statute of limitations or any prescriptive right, the period of time shall be computed in the same manner as though this Act had not been passed."

For reasons of efficiency and other advantages the government often, in latter years, has seen fit to utilize corporations to conduct its affairs. When it does so, it should be held to have subjected them to the usual incidents of that form. Unless it manifests a different intention, it thereby exhibits an intention that the rules applicable to corporations and not to the sovereign apply. In

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[15]Conference Report No. 2444, June 19, 1948, 2 U.S. Code Congressional Service, 80th Congress, 2d Sess., pp. 2155, 2156:

> "The Senate bill provided that Commodity Credit Corporation shall have the immunities of the United States from State statutes of limitations. The House amendment did not contain such a provision. Under the conference substitute a 4-year statute of limitations will apply to suits brought by or against the Corporation."

In 1949 the 4-year statute was extended to 6 years, 63 Stat. 154, 156.

answering a variety of other questions this Court has so held. *Federal Land Bank v. Priddy,* 295 U.S. 229; *Keifer & Keifer v. Reconstruction Finance Corporation,* 306 U.S. 381; *Federal Housing Administration v. Burr,* 309 U.S. 242; *Reconstruction Finance Corporation v. Menihan Corp.,* 312 U.S. 81; *Sloan Shipyards v. U. S. Fleet Corporation,* 258 U.S. 549. These are the decisions to which the legislative history cited above refers.

United States v. Edgerton & Sons, 178 F.2d 763 (2 Cir.) summed up these cases by saying:

> "When the United States conducts business transactions through a corporation, the tendency of recent decisions is to hold that such corporation does not possess sovereign immunity unless expressly endowed with it." (p. 764)

As said in *Reconstruction Finance Corporation v. Breeding,* 211 F.2d 385, 390 (10 Cir.), "when acting as a litigant in a court of competent jurisdiction, it is not clothed with the prerogatives or immunity of the sovereign."

Although lower courts continue to speak of the rule *quod nullum tempus occurrit regi* as an aspect of the doctrine of sovereign immunity which shields the government from suit, this Court's decision in *Guaranty Trust Co. v. United States* 304 U.S. 126, shows that the rule is of lesser dignity. Since government corporations are not shielded by the doctrine of sovereign immunity from suit, *a fortiori* they do not have the government's exemption from the statute of limitations.

The *Guaranty Trust* case shows that if *nullum tempus* is to have justification in modern times, it must find it in some public policy strong enough to overcome the very strong public interest in repose. Therefore it has been narrowly restricted in its application. See, for example, the illustrations and this statement in footnote 3 in that decision:

> "The rule *nullum tempus* has never been extended to agencies or grantees of the local sovereign such as municipalities, county boards, school districts and the like. *Metropolitan R. Co. v. District of Columbia,* 132 U.S. 1; *Boone County v.*

Burlington & Missouri River R. Co., 139 U.S. 684, 693." (p. 135)

The basic theory of the rule is that, having many agents, the government should not be taxed with their delays. But this reasoning becomes hollow or loses force when applied to government corporations. Long after the rule *nullum tempus* developed large corporations grew up, and through them much of the economic life of the country is carried on. Yet no one would contend that the fact that a corporation must act through a multiplicity of agents should override the social interest in repose. The corporate form is a tighter structure and thought to be more controllable than the non-corporate. Correlatively, the agents' delays are justly chargeable to his corporate principal.[16]

The court below has sought to decide the question—to reconcile the conflict between the social interests in protecting government rights on the one hand and the social interest in repose and the social interest in holding the government to the same standards of conduct as its citizens on the other—by considering whether the government in a particular context is exercising a proprietary or a

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[16]Cf. the experience of the United Kingdom. Much of the Nationalization program is being effected through public corporations, and they are being subjected to the ordinary laws of the land. William A. Robson "British Public Corporations," 63 Har. Law Rev. 1321, 1338. *Tamlin v. Hannford*, [1950] 1 K.B. 18, held that the British Transport Commission did not have the immunities of the Crown, except where specifically provided. The Acts creating the National Coal Board [Coal Industry Nationalization Act, 1946, 9 & 10 Geo. 6, c. 59, Secs. 49(1) and (2)] and the Electricity Board [Electricity Act, 1947, 10 and 11 Geo. 6, c. 54, Sec. 12] provide that actions against them shall not be subject to the short statute of limitations applicable to actions against a public authority.

Cf. also Thurston, Government Proprietary Corporations, 21 Va. Law Rev. 465, 496:

> "The paramount authority of Congress to control its national corporations must be admitted, and generally it would seem desirable for Congress to prescribe as far as possible the rules governing its corporations rather than leave matters to the varying laws of the 48 states. But where Congress has not acted the state laws should generally be held to apply, and in view of the commercial nature of the corporations and their separate legal personality, the plea that they are instrumentalities of the national government ought not to be too readily listened to."

governmental function. We think this a delusive futility, for the federal government must justify whatever it does as an exercise of its power to govern. The brief of the Solicitor General in opposition agrees with this view (Brief, p. 6, fn. 4), and thus it abandons the reasoning of the court below.

The government must therefore be contending that statutes of limitations never apply to government corporations unless Congress expressly so provides. We think that the contrary is true, as a fair submission from legislative history reviewed above and this Court's decisions: Congress, in reconciling the several social interests, has recognized the greater justice of statutes of limitations and has believed that by adopting the corporate form it subjects claims to state statutes unless it provides express immunity or specifies its own time limits.

CONCLUSION

It is respectfully submitted that the Court should grant the writ, and should then hold plaintiff's claim subject to the statute of limitations of the False Claims Act, or, if not, to the applicable state statute.

Dated: San Francisco, California, July 12, 1954.

MOSES LASKY
Attorney for Western States Meat Packers Association, Inc.

BROBECK, PHLEGER & HARRISON
Of Counsel.

(APPENDICES FOLLOW)

APPENDIX I

False Claims Act

(R. S. 3490-3494, as amended, 57 Stat. 608, 31 U.S.C., Sec. 231 et seq.)

31 U.S.C. Sec. 231:

"Any person not in the military or naval forces of the United States, or in the militia called into or actually employed in the service of the United States, who shall make or cause to be made, or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, or who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, or who enters into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim, or who, having charge, possession, custody, or control of any money or other public property used or to be used in the military or naval service, who, with intent to defraud the United States or willfully to conceal such money or other property, delivers or causes to be delivered, to any other person having authority to receive the same, any amount of such money or other property less than that for which he received a certificate or took a receipt, and every person authorized to make or deliver any certificate, voucher, receipt, or other paper certifying the receipt of arms, ammunition, provisions, clothing, or other property so used or to be used, who makes or delivers the same to any other person without a full knowledge of the truth of the facts stated therein, and with intent to defraud the United States, * * * shall forfeit and pay to the United States the

sum of $2,000, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit."

Sec. 232:

"(A) The several district courts of the United States, the several district courts of the Territories of the United States, within whose jurisdictional limits the person doing or committing such act shall be found, shall wheresoever such act may have been done or committed, have full power and jurisdiction to hear, try, and determine such suit. * * *"

Sec. 233:

"It shall be the duty of the several United States attorneys for the respective districts, for the District of Columbia, and for the several Territories, to be diligent in inquiring into any violation of the provisions of section 231 of this title by persons liable to such suit, and found within their respective districts or Territories, and to cause them to be proceeded against in due form of law for the recovery of such forfeiture and damages. And such person may be arrested and held to bail in such sum as the district judge may order, not exceeding the sum of $2,000, and twice the amount of the damages sworn to in the affidavit of the person bringing the suit."

APPENDIX II

OFFICE OF THE SOLICITOR GENERAL
Washington, D. C.

June 11, 1954

Moses Lasky, Esquire
Brobeck, Phleger & Harrison
111 Sutter Street
San Francisco 4, California

Re: No. 108 Aaron Borin d/b/a Wichita Packing Company v. United States

Dear Mr. Lasky:

In accordance with your request, I hereby consent to your filing a brief amicus curiae in the above-entitled case on behalf of Western States Meat Packers Association, Inc.

A copy of this letter is being sent to the Clerk of the Supreme Court.

Sincerely yours,

SIMON E. SOBELOFF
Solicitor General

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1953

No. .....

AARON BORIN, D/B/A WICHITA PACKING COMPANY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

CONSENT TO FILING OF BRIEF OF AMICUS CURIAE

Consent is hereby given to the filing by Western States Meat Packers Association, Inc. of a brief as amicus curiae in support of petition for writ of certiorari to be filed herein by Aaron Borin, dba Wichita Packing Company, to review the judgment of the United States Court of Appeals for the Fifth Circuit in the case of United States of America vs. Aaron Borin, dba Wichita Packing Company, No. 14534.

Dated: May 25, 1954.

HERMAN P. GREENBERG
Attorney for Aaron Borin, Petitioner

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Attorney for United States of America